89-746

No. _____

Supreme Court, U.S.
FILED
OCT 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

GENE R. SMITH CORPORATION,

Petitioner,

v.

TERRY'S TRACTOR, INC., a California corporation; GEORGE LARABEE, individually and doing business as L & L CONSTRUCTION AND L & L ELECTRIC; WALTER L. SCHWAAR, individually and doing business as THE LIGHT GALLERY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTION-PRESENTED

This case presents an issue in dispute among two United States Circuit Courts of Appeals regarding malicious prosecution and abuse of process:

Is a state barred from affording its citizens a remedy for abuse of process and the malicious prosecution of an involuntary bankruptcy case:

(a) where the bankruptcy court dismissed the bankruptcy case as improper; and

(b) where there is no indication that Congress intended to preempt state court remedies.

LIST OF THE PARTIES

The caption of the case in this Court contains the names of all parties. There are no parent companies, affiliates or non wholly-owned subsiduaries of the moving party.

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7 Witkin, Summary of California Procedure (3d Ed. 1985), Trial, section 87, page 87 16

OPINIONS BELOW

The opinion of the California Court of Appeal for the Fourth Appellate District is reprinted in the Appendix at Appendix 1.

The order of the Supreme Court of the State of California denying a Petition For Review is reprinted in the Appendix at Appendix 2.

JURISDICTION

The jurisdiction of this Court is invoked on the grounds that a conflict exists among the United States Circuit Courts of Appeals and, in reliance upon one of those conflicting decisions, the California Court of Appeal has held state law remedies are preempted by federal bankruptcy statutes.

The judgment to be reviewed is that of the California Court of Appeal, Fourth Appellate District, filed April 18, 1989. A

petition for review was denied by the California Supreme Court on July 13, 1989.

The statute conferring jurisdiction upon this Court to review the judgment is 28 U.S.C. section 1257(a).

CONSTITUTIONAL STATUTE INVOLVED

Seventh Amendment, United States Constitution:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

11 U.S.C. section 303(i):

> If the court dismisses a petition under this section other than on consent of all petitioners and the debtor, and if the debtor does not waive the right to judgment under this subsection, the court may grant judgment--
>
> (1) against the petitioners and in favor of the debtor for
>
> (A) costs; or

(B) a reasonable attorney's fee; or

(2) against any petitioner that filed the petition in bad faith for-

(A) any damages proximately caused by such filing; or

(B) punitive damages.

STATEMENT OF THE CASE

1. The Involuntary Bankruptcy.

During 1984, Petitioner Gene R. Smith Corporation ("Smith") built several apartment buildings in San Diego County. (CT 44.) Respondents were subcontractors on some of Smith's sites during 1984. (CT 44,) A dispute developed over respondent Terry's Tractor, Inc.'s ("Tractor") claim for payment on a job site in Vista, California. On October 9, 1984, Tractor, as sole petitioning creditor, filed a petition placing Smith in an involuntary bankruptcy ("Involuntary Bankruptcy"). (CT 14-16.) Thereafter, George

Larabee and Walter L. Schwaar ("Schwaar") joined in the Involuntary Bankruptcy.

Smith appeared and moved to dismiss the Involuntary Bankruptcy on the grounds, inter alia, that only one creditor had filed the petition (not three as required by section 303 of the United States Bankruptcy Code) and that each of the respondents were ineligible to be petitioning or joining creditors because their claims were the subject of bona fide disputes.[1] (CT 44.) The bankruptcy court ruled that the bankruptcy petition was improperly filed, and dismissed the bankruptcy. (CT 72-73.) The bankruptcy court's judgment was affirmed on appeal.

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[1]After the bankruptcy was filed, Smith learned that Tractor was not a licensed contractor at all times of the work. This would bar any claim under state law. California Business And Professions Code, section 7031.

2. The State Court Action.

Smith filed this action in October, 1985 alleging that respondents willfully and maliciously filed and prosecuted the Involuntary Bankruptcy without probable cause. Smith seeks compensatory and punitive damages for respondents' conduct. (CT 1, 9-13.) The complaint also alleges a cause of action for abuse of process. (CT 9-13.)

On December 29, 1987, Schwaar moved for judgment on the pleadings on the grounds that: (1) each cause of action was preempted by federal law; and, (2) the state court has no subject matter jurisdiction over those claims. (CT 26-27.)

At a hearing on January 15, 1988, the Superior Court for the County of San Diego, North County Branch, the Honorable Jeffrey T. Miller presiding, granted Schwaar's motion and

dismissed Smith's Complaint, with prejudice. (CT 80-81.) On March 7, 1988, the court also entered a judgment against Smith, in favor of Schwaar. (CT 79.) Smith timely filed a notice of appeal to the California Court of Appeal, Fourth Appellate District, Division One. (CT 82-83.)

3. The Published Opinion Of The Court Of Appeal.

On April 18, 1989, the California Court of Appeal, in an opinion certified for publication, affirmed the decision of the trial court. Relying upon dicta in **Gonzales v. Parks**, 830 F.2d 1033 (9th Cir. 1987) (state court does not have jurisdiction to determine propriety of voluntary bankruptcy case while bankruptcy is pending), the Court of Appeal held that section 303(i)(2) of the United States Bankruptcy Code preempts all state court remedies for malicious prosecution and

abuse of process of an involuntary bankruptcy case. (Opinion p. 5) A copy of the opinion is attached as Appendix 1. On July 13, 1989 the California Supreme Court denied petitioner's petition for review. See Appendix 2.

ARGUMENT

Review of this case is necessary to settle an important question of law: Is the State of California barred from affording its citizens a remedy for the malicious prosecution of an involuntary bankruptcy case.

An involuntary bankruptcy case can have devastating impact upon the party wrongfully charged with bankruptcy. In this case, the complaint alleges damages in excess of $500,000 caused by the respondents' improper and malicious filing of the case. The bankruptcy court properly exercised its

jurisdiction, found the bankruptcy was improper, and dismissed the case. The bankruptcy court did not hear or consider any damages caused by the improper filing. This case was then filed to remedy the wrongful action. The trial court dismissed the complaint on the basis of preemption and the state Court of Appeal affirmed solely on the basis of the Ninth Circuit Court of Appeals decision of **Gonzales v. Parks**, 830 F.2d 1033 (9th Cir. 1987). This is inconsistent with the Third Circuit Court of Appeals' decision in **Paradise Hotel Corp. v. Bank of Nova Scotia**, 842 F.2d 47, 52 (3d Cir. 1988). Moreover, there is no indication of Congressional intent to preempt longstanding state law claims on the subject.

Petitioner respectfully submits that review by this Court should be granted.

I.

CONGRESS HAS NOT PREEMPTED STATE MALICIOUS PROSECUTION LAWS

This Court has emphasized the standard for determining when preemption occurs: the Congressional intent to preempt must be unmistakably clear.

> The principle to be derived from our decisions is that federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons -- either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained. (Citation omitted.)

Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142, 10 L.Ed.2d 248, 257 (1963).

Applying **Gonzales**, the state court felt compelled to find that a state malicious prosecution cause of action could not be asserted following the dismissal of an

improper bankruptcy. The **Gonzales** court so held without any analysis of specific Congressional intent. In fact, at oral argument before the state Court of Appeal, respondents conceded that no such intent was discernible from the Legislative History. The **Gonzales** court pointed only to an alternative remedy provided by Congress in 11 U.S.C. §303(i)(2).

Prior to the 1978 enactment of 11 U.S.C. §303(i)(2), the only remedy for litigants was a state law claim for malicious prosecution when they successfully defended an involuntary bankruptcy. **In Re Shon**, 212 F. 797 (D.Mass. 1913).[2] Courts have uniformly held that an involuntary bankruptcy, insolvency, or receivership proceeding, which is a special

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[2]If a bond was posted in the bankruptcy case, the bankruptcy court could assess damages against the bond.

proceeding rather than a criminal prosecution or a civil action in the strict sense, may form the basis for a malicious prosecution action. Guthrie, **Action For Malicious Prosecution Based On Institution Of Involuntary Bankruptcy, Insolvency Or Receivership Proceeding**, 40 A.L.R.3d 296 (1986). There is nothing in the Congressional record or in the code itself to suggest that 11 U.S.C. §303(i)(2) was intended to do anything but supplement these remedies. In fact, this Court rejected the notion that the bankruptcy law preempts all state and local laws. **Midatlantic National Bank v. New Jersey Dept. of Environmental Protection**, 474 U.S. 494 (1986). Federal bankruptcy courts can and do leave issues of malicious prosecution to the state court. **In re Emerald City Records, Inc.**, 9 B.R. 319 (Bankr. N.D. Ga. 1981). In

Emerald City, the bankruptcy court remanded to the state court a claim for malicious prosecution of an involuntary bankruptcy case. The court held that it had concurrent jurisdiction to determine a damage claim under 11 U.S.C. §303(i)(2) and state law malicious prosecution claims, but felt the state court was the most appropriate forum to decide the case.

Similarly, in **Paradise Hotel**, 842 F.2d at 52, the court found that the remedy provided by Congress in 11 U.S.C. §303(i) was not exclusive:

> We agree that [11 U.S.C. §303(i)] was intended to permit a bankruptcy court to adjudicate claims in a Chapter 7 proceeding like those of Paradise. It does not require that all such claims be so adjudicated, however, and we know of no case which so holds. Moreover, we believe it would be inconsistent with the overall scheme of the Code to find that §303(i)(2) is an exclusive remedy for such claims.

The court below based preemption on the mere existence of a federal law on the same subject:

> [11 U.S.C. §303(i)(2)] reflects Congress' intent that the case by case development of law relating to "bad faith" in this context should be accomplished in federal courts and not in state courts.

(Opinion, p. 5.)

The respondents and the court below relied entirely upon **Gonzales v. Parks**, 830 F.2d 1033. **Gonzales**, however, is inapposite. In **Gonzales**, while the bankruptcy case was pending, a creditor filed a lawsuit for abuse of process in state court against the debtor and the debtor's attorney. A default judgment was entered by the state court and the debtor (and the debtor's counsel) sought to hold the plaintiff in violation of the bankruptcy's automatic stay. The **Gonzales** court ruled

that, while the case was pending, only the bankruptcy court had jurisdiction to determine whether the bankruptcy was properly filed, and a creditor could not collaterally attack the propriety of the bankruptcy filing in state court. The state court judgment was held void for lack of jurisdiction. Id. at 1035.

Admittedly, the Gonzales case contains dicta that broadly applies the exclusive jurisdiction of the bankruptcy court as an "implicit rejection" of state court remedies for abuse of process. However, in Gonzales, the bankruptcy case was pending when the state court lawsuit was filed and was an attempted collateral attack on the propriety of the bankruptcy in the state court. Here, the bankruptcy court rendered a final determination that the bankruptcy filing was improper. The bankruptcy was then dismissed.

This case does not interfere with or impede the bankruptcy court's exercise of its exclusive jurisdiction.

The only other court to consider Gonzales came to the same conclusion. In **Kensington Development Corp. v. Israel**, 142 Wis.2d 894, 419 N.W.2d 241 (1988), the Wisconsin Supreme Court held that state tort claims could be asserted once the bankruptcy court dismisses the case. Upon dismissal, there was no bankruptcy action to take federal supremacy and exclusivity.

II.

SECTION 303(i) SHOULD BE INTERPRETED TO AVOID A FINDING OF UNCONSTITUTIONALITY

If interpreted to preempt state malicious prosecution laws, 11 U.S.C. §303(i) would be unconstitutional because it denies the aggrieved party of its right to a trial by jury. In **Granfinanciera, S.A. v. Nordberg**,

___U.S.___, 57 U.S.L.W. 4898 (1989), the Court recognized that a party could not be deprived of a right to a jury trial under the Seventh Amendment. 11 U.S.C. §303(i) purports to vest in the bankruptcy judge (a non-article III judge) the power to render a judgment, including all damages and punitive damages for the filing of an involuntary bankruptcy in bad faith. At common law, the plaintiff in a malicious prosecution case, however, was entitled to a jury trial. 7 Witkin, Summary of California Procedure (3d Ed. 1985), Trial, section 87, page 87. The effect of the ruling in **Gonzales** is to require those who are wrongfully placed in involuntary bankruptcy to submit the question of their rights and damages to the bankruptcy judge. If, however, 11 U.S.C. §303(i) creates an additional, alternative statutory right to compensation,

the statute would not offend the Seventh Amendment.

CONCLUSION

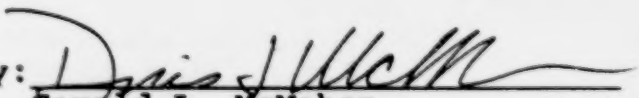
If allowed to stand, the decision of the California Court of Appeal establishes a standard of federal preemption that could bar state court remedies whenever federal laws exist. State causes of action which complement federal laws (e.g., antitrust, securities laws, wire and mail fraud, environmental protection) would all be preempted by the loose standard adopted by this decision.

More importantly, states have a strong interest in protecting their citizens from malicious prosecution of civil cases, whether such cases are filed in federal or state court. State malicious prosecution laws complement the goal of limiting baseless

litigation reflected by Rule 11 of the Federal Rules of Civil Procedure (in federal civil litigation) and Bankruptcy Code section 303(i)(2) in bankruptcy cases. Nothing suggests that Congress intended to restrict the longstanding remedies afforded by state laws in cases such as this one. Petitioner respectfully submits that the Court should act to settle this important question of law.

Dated: November 6, 1989.

SELTZER CAPLAN WILKINS & McMAHON

By: 

Gerald L. McMahon
Dennis J. Wickham
Craig E. Courter
Attorneys for Petitioner Gene R. Smith Corporation

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 3003-3043 Fourth Avenue, San Diego, California 92103; that on November 8, 1989, I served the within PETITION FOR WRIT OF CERTIORARI in said action or proceeding by depositing true copies thereof in a separate envelope for each addressee named hereafter, addressed to each addressee respectively as follows:

Clerk, U.S. Supreme Court 1 First Street, N.E. Washington, D.C. 20543	Original and 39 copies (via Federal Express)
Clerk, California Court of Appeal Fourth Appellate District 750 B Street, Suite 5000 San Diego, CA 92101	3 copies
Clerk of the San Diego Superior Court for the Honorable Jeffrey T. Miller 325 South Melrose Drive Vista, CA 92083	3 copies

Gregory W. Pollack, Esq. — 3 copies
McInnis, Fitzgerald, Rees,
Sharkey & McIntyre
1320 Columbia Street
San Diego, CA 92101

S. Myron Klarfled, Esq. — 3 copies
Klarfled & Maillian
10960 Wilshire Boulevard
Suite 510
Los Angeles, CA 92101

Shawn F. Kelly, Esq. — 3 copies
530 B Street, Suite 2001
San Diego, CA 92101

I then sealed the envelopes and placed them for mailing in accord with our business's practice on November 8, 1989.

I am readily familiar with our business's practice for collecting, processing and mailing correspondence and pleadings. Such correspondence and pleadings are deposited on the same day with the U.S. Postal Service in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on November 8, 1989.

Lisa Sandoval

LISA SANDOVAL

APPENDIX

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

FILED:
April 18, 1989

GENE R. SMITH CORPORATION, Plaintiff and Appellant, v. TERRY'S TRACTOR, INC., et al., Defendants and Respondents.	D007928 (Super. Ct. No. N30755)

APPEAL from a judgment of the Superior Court of San Diego County, Jeffrey T. Miller, Judge. Affirmed.

Gerald L. McMahon, Dennis J. Wickham, Craig E. Courter and Seltzer, Caplan, Wilkins & McMahon for Plaintiff and Appellant.

APPENDIX 1

Gregory W. Pollack, McInnis, Fitzgerald, Rees, Sharkey & McIntyre and Shawn F. Kelly for Defendants and Respondents.

Plaintiff Gene R. Smith Corporation (Smith) appeals the judgment dismissing all defendants after the court ruled Smith's causes of action for abuse of process and malicious prosecution for the allegedly wrongful and malicious prosecution of an involuntary bankruptcy instituted by the defendants were preempted by federal law, depriving the trial court of subject matter jurisdiction. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Smith, a developer and builder, had commercial dealings with defendants, Terry's Tractor Inc., George Larabee doing business as L & L Construction and L & L Electric and

Walter L. Schwaar doing business as the Light Gallery. Allegedly Smith failed to pay Terry Tractor's bill for labor and material resulting in Tractor's petitioning under Chapter 11 to place Smith in involuntary bankruptcy. L & L and the Light Gallery as creditors joined in that proceeding. Smith successfully moved to dismiss the petition and then filed this action for malicious prosecution and abuse of process, alleging the defendants willfully and maliciously filed and prosecuted the involuntary bankruptcy. The Light Gallery successfully moved for judgment on the pleadings. The court dismissed the complaint as against all the defendants ruling that each cause of action was preempted by federal law and the state court had no subject matter jurisdiction over those claims.

DISCUSSION

To a great extent the outcome of this appeal hinges on our interpretation of Gonzales v. Parks (9th Cir. 1987) 830 F.2d 1033. Because Gonzales materially influenced the trial court's favorable ruling the defendants understandably urge that Gonzales is persuasive and should govern our analysis. Smith, on the other hand, vigorously argues Gonzales is factually and procedurally distinguishable from his case and in any event its broad language adversely affecting him is simply dicta. Even though there is some technical merit to Smith's assertion, we conclude Gonzales correctly states the considerations controlling our review and on the basis of those considerations we affirm the judgment.

Gonzales involved the following.

Gonzales involved the following.

Attorney Michael Dodge filed a Chapter 11 bankruptcy petition for his clients Richard and Juliana Gonzales. Apparently one purpose of the bankruptcy was to stay a foreclosure of the Gonzales' house by Barbara Parks. Pending the bankruptcy proceedings Parks sued the Gonzaleses and Dodge in state court alleging the debtors' filing of the voluntary bankruptcy was an abuse of process. Parks entered a default against the Gonzaleses and obtained a $10,000 default judgment against them. Later Dodge and the Gonzaleses filed an adversary proceeding in the bankruptcy court against Parks and her counsel, Jerome Parks, seeking relief from the state court action. The bankruptcy court declared the state court judgment void as violating the automatic stay provisions of the bankruptcy

act, vacated the judgment and awarded fees to the bankrupt and to their counsel. On appeal, the district court affirmed the bankruptcy's court judgment and fee award also awarding sanctions against Parks' counsel. Except as to the sanctions, the Ninth Circuit affirmed emphasizing the federal courts exclusive jurisdiction over bankruptcy proceedings.

"Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating." (Gonzales at p. 1035; fn. omitted.)

Smith points out that there is a significant procedural difference between Gonzales and the case before us stressing that

in Gonzales, unlike the facts here, the bankruptcy case was pending at the time the state court action was filed. While we agree with Smith's observation that a case must be interpreted in the context in which it was decided, we cannot overlook Gonzales' broad - and we believe correct - policy statements.

"That Congress' grant to the federal courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in state courts is supported by the fact that remedies have been made available in the federal courts to creditors who believe that a filing is frivolous. Debtors filing bankruptcy petitions are subject to a requirement of good faith, [citation] and violations of that requirement can result in the imposition of sanctions, . . . 11 U.S.C.A. §303(i)(2) (Supp. 1987) (authorizing the imposition of sanctions on petitions for involuntary bankruptcy petitions filed in bad faith). Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits. Even the mere possibility of being sued in tort in state court could in some instances deter persons from exercising their rights in

bankruptcy. In any event, it is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized." (Gonzales at pp. 1035-1036; emphasis added.)

We agree with the foregoing even if those comments are properly described as dicta.

11 United States Code section 303(i) permits the bankruptcy court on dismissal of a petition to award a debtor costs, reasonable attorney's fees and any damages proximately caused by the taking of the debtor's property. If the involuntary petition is filed in bad faith the bankruptcy court has the additional power to award damages proximately caused by such filing and punitive damages.

This provision reflects Congress' intent that the case by case development of law relating to "bad faith" in this context should be accomplished in federal courts and not in

state courts. The parties make no effort to distinguish the difference, if any, between conduct constituting "bad faith" and "malicious prosecution" treating both as virtually identical. On that asumption, it would indeed be anomalous, and to say the least, inconsistent with this legislative intent, for state courts to develop a different, more liberal definition of "bad faith" for malicious prosecution purposes than that developed in the federal system. Different standards defining identical conduct adds an unnecessary and confusing component to the uniform law to be applied in bankruptcy proceedings. The additional risk that substantial damage awards in state courts would create a material disincentive to those seeking to use the bankruptcy laws only exacerbates the problem. The determination

of damages in state courts should not determine the potential cost of entry into the federal bankruptcy system.

Smith's description of the injustice inflicted on a debtor improperly and maliciously placed in involuntary bankruptcy who wishes to seek appropriate sanctions from those responsible for doing so is certainly of concern. Smith explains the only way the aggrieved debtor will be able to obtain redress in such circumstances will be to remain in bankruptcy which involves further harm to a party's ability to obtain credit, enter into contracts or to run its business.

In addition to our unwillingness to accept Smith's factual predicate which requires us to accept the adverse consequences of a bankruptcy pending for the sole purpose of awarding the debtor damages for the

wrongful filing of an involuntary bankruptcy petition, we disagree with Smith's legal predicate. The bankruptcy court can dismiss the involuntary bankruptcy petition eliminating the potential harm which Smith describes retaining jurisdiction for the sole purpose of awarding costs, attorney's fees and damages. (In re Godroy Wholesale Co., Inc. (D. Mass. 1984) 37 Bankr. 496, 498.)

Smith correctly observes that limiting his remedy to the bankruptcy forum deprives him of a jury trial, but interestingly does not accompany his claim of unconstitutionality with any authority. We believe his omission is significant for a number of reasons. The most basic is our assumption that if there were such authority he would have directed us to it. Also omitted in Smith's conclusionary argument is whether he is relying on the

United States or California Constitutions. We assume his argument rests on the former since a federal statute can be invalidated only on Federal and not on state constitutional grounds. In effect Smith challenges the constitutionality of 11 United States Code section 303(i), a virtually impossible argument to make since there is no constitutional right to a jury in matters which arise in bankruptcy even if there is a right to a jury if those same matters were litigated outside bankruptcy. (See e.g. Katchen v. Landy (1966) 382 U.S. 323, 336-337.) The right to a jury has never been interpreted in a rigid manner.

"[M]any procedural devices developed since 1791 that have diminshed the civil jury's historic domain have been found not to be inconsistent with the Seventh Amendment. See Galloway v. United States, 319 U.S. 372, 388-393 (directed verdict does not violate the Seventh Amendment); Gasoline Products Co. v. Champlin Refining Co., 283 U.S. 494, 497-498

(retrial limited to question of damages does not violate the Seventh Amendment even though there was no practice at common law for setting aside a verdict in part); Fidelity & Deposit Co. v. United States, 187 U.S. 315, 319-321 (summary judgment does not violate the Seventh Amendment)." (Parklane Hosiery Co. v. Shore (1979) 439 U.S. 322, 336.)

DISPOSITION

The judgment is affirmed. [1]

CERTIFIED FOR PUBLICATION

s/s
WIENER, J.

---

[1] Our disposition reflects our rejection of Smith's argument that the court erred in entering judgment after granting the Light Gallery's motion for judgment on the pleadings and his request that we vacate the judgment. The entry of a judgment implementing a court's order occurs routinely for a number of valid reasons. Smith's implicit quarrel with the judgment here is that it removes all the defendants when only a single defendant brought the motion. Although in certain circumstances the trial court's broad sweep might be improper we conclude the action here was a prudent and economical use of judicial resources. Lacking subject matter jurisdiction over one defendant the court lacked subject matter jurisdiction over all.

WE CONCUR:

s/s
KREMER, P.J.

s/s
HUFFMAN, J.

O R D E R D E N Y I N G R E V I E W

AFTER JUDGMENT BY THE COURT OF APPEAL
Fourth Appellate District,
Division One, No. D007928
S010453

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

GENE R. SMITH CORPORATION,
Appellant

v.

TERRY'S TRACTOR INCORPORATED Et Al.,
Respondents

Appellant's petition for review DENIED.

SUPREME COURT
FILED
JULY 13, 1989

Robert Wandruff
Clerk

s/s
Acting Chief Justice

APPENDIX 2

Supreme Court, U.S.
FILED
FEB 13 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-746

In The

Supreme Court of the United States

October Term, 1989

GENE R. SMITH CORPORATION,

Petitioner,

v.

TERRY'S TRACTOR, INC., a California corporation; GEORGE LARABEE, individually and doing business as L & L CONSTRUCTION AND L & L ELECTRIC; WALTER L. SCHWAAR, individually and doing business as THE LIGHT GALLERY,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

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No. 89-746

In The

Supreme Court of the United States

October Term, 1989

GENE R. SMITH CORPORATION,

Petitioner,

v.

TERRY'S TRACTOR, INC., a California corporation; GEORGE LARABEE, individually and doing business as L & L CONSTRUCTION AND L & L ELECTRIC; WALTER L. SCHWAAR, individually and doing business as THE LIGHT GALLERY,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FOURTH APPELLATE DISTRICT

INTRODUCTION

Petitioner, Gene R. Smith Corporation has prayed for a writ of certiorari to

review the judgment and opinion of the Court of Appeals of the State of California, following its denial of Petition for Review by the Supreme Court of the State of California on July 13, 1989.

The present writ is sought based upon an alleged conflict between the Ninth and Third Circuits denying petitioner a state court cause of action for malicious prosecution and abuse of process resulting from an involuntary bankruptcy. Respondent Terry's Tractor, Inc. contends no conflict exists as the case used from the Third Circuit has limited application.

STATEMENT OF CASE

Petitioner, Gene R. Smith Corporation ("Smith") was a developer of apartments in the Cities of Oceanside, Vista and Escondido in San Diego County. Respondent, Terry's

Tractor, Inc. ("Terry") had commercial dealings (Terry rented, manned and maintained equipment at an hourly rate at Smiths request.)[1] An alleged dispute was raised with respondent over contractors licensing requirements to raise a bonafide dispute issue after the involuntary filing, this has since been resolved favorable to respondent. See Footnote 1.

Thereafter, Smith created the same alleged disputes with other respondents who joined in the petition. On November 28, 1984, the bankruptcy court found the filing premature and dismissed the petition without prejudice. No impropriety was found or

---

[1] Since the dismissal without prejudice of the involuntary bankruptcy and prior to the filing of this writ, Terry obtained judgment against Smith for breach of rental agreement on August 15, 1989, San Diego Superior Court, North County Judicial District Case No. N27443, in the principal amount claimed of $80,915.00

prejudice. No impropriety was found or adjudicated and the bankruptcy court dismissed without prejudice indicating that it may well see the case again.

The bankruptcy court judge addressed the hearing of damages and counsel for Smith waived said proceedings under 11 U.S.C. § 303(i) to pursue its remedy, albeit erroneously, in state court.

Smith then proceeded to file a state court Declaratory Relief action to ensure itself of no refiling of the involuntary bankruptcy and to create a bona fide dispute in November 1984. In December 1984, Smith filed the state court malicious prosecution action and abuse of process which is the subject of this present petition.

Respondent contends that the Fourth District Court of Appeals for the State of California was correct in its ruling; and

that no conflict exists as Smith contends between the Ninth and Third United States Circuit Courts of Appeal.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. THE BANKRUPTCY COURT DID NOT HEAR OR CONSIDER ANY DAMAGES UNDER 11 U.S.C. 303(i) BECAUSE PETITIONER WAIVED THEIR RIGHT TO HAVE THE COURT HEAR ITS DAMAGE CLAIM.

The appellant has not clearly or concisely informed the Court that it had an opportunity to have the issue of damages adjudicated by the Bankruptcy Judge prior to the dismissal of the involuntary proceeding or at a subsequent hearing after dismissal by reserving its right with the bankruptcy court. Petitioner expressly waived its rights to the hearing of damages under the mistaken belief it could have the state court interpret the bankruptcy code in a

malicious prosecution and abuse of process action in state court.

If dismissal is for any cause other than consent of all petitioners and the debtor, and <u>if the debtor does not waive</u> the right to judgment, the court may grant judgment against the petitioners and in favor of the debtor for costs, a reasonable attorney's fee, or any damages proximately caused . . . Additionally, if any petitioner filed the petition in bad faith, the court may grant judgment against such petitioner for any damages proximately caused by such filing, or for punitive damages. (Emphasis added.)

5 Fed Proc., L.Ed § 9:268

B. PETITIONERS THRUST OF THE PETITION FOR WRIT OF CERTIORARI IS ITS DENIAL TO RIGHT OF JURY TRIAL UNDER THE SEVENTH AMENDMENT AS PETITIONER THOUGHT NO RIGHT TO A JURY TRIAL EXISTED IN THE BANKRUPTCY COURT.

Petitioner by its waiver of any hearing of damages by the bankruptcy court also was erroneous in its assumption as it waived its right to a jury trial in bankruptcy court.

Prior to the amendments dated July 10, 1984 and to alleviate the turmoil over **NORTHERN PIPELINE CONSTRUCTION CO. v. MARATHON PIPE LINE CO., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed. 2d 598 (1982)**, Congress, consistent with the Constitution could confer the power to conduct jury trials in the bankruptcy courts.

28 U.S.C. § 1411 (1986) provides:

> (a) Except as provided in subsection (6) of this section, this chapter and title 11 do not affect any right to trial by jury that an individual has under applicable non bankruptcy law with regard to a personal injury or wrongful death tort claim.
> (b) The district court may order the issues arising under section 303 of title 11 to be tried without a jury. (Emphasis added.)

The claims of malicious prosecution and abuse of process are akin to personal injury actions and triable by a jury in either bankruptcy court or district court. Further, subsection(b) expressly states the district court may waive jury trial. Upon proper application to the district court a jury trial could have been held in the bankruptcy court absent petitioners waiver. The right to trial by jury in the bankruptcy courts since July 10, 1984 is supported by the findings in **In RE M^{c}CORMICK, 67 B.R. 838 (D. NEV. 1986); In RE ADAMS, BROWNING & BATES, LTD., 70 B.R. 490 (Bkrtcy. E.D.N.Y. 1987).**

C. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT AND THIRD CIRCUIT ON A STATES' JURISDICTION OVER MALICIOUS PROSECUTION AND ABUSE OF PROCESS AS A RESULT OF AN INVOLUNTARY BANKRUPTCY.

The Ninth Circuit Court of Appeals in **GONZALES v. PARKS 830 F.2d 1033 (9th Cir. 1987)** states what respondent perceives as the correct intent of Congress by its interpretation of the exclusivity of the federal courts over 11 U.S.C. § 303 issues including that of Malicious Prosecution and Abuse of Process.

Petitioner relies upon **PARADISE HOTEL CORP. v. BANK OF NOVA SCOTIA 842 F.2d 47 (3d Cir. 1988)** to defeat and/or create a conflict between the appellate courts to maintain its contention that this Court needs to review and resolve a conflict. There is no conflict because a careful reading of **PARADISE** shows the Third Circuit is discussing non exclusivity between bankruptcy courts and district courts. Both courts quite clearly are federal and capable of interpreting Title 11 of the United

States Code. **PARADISE** does not address directly or by inference or innuendo that any power to confer an exclusive remedy to state court was sought.

Petitioner has misinterpreted the intent and factual situation involving **PARADISE** to maintain a basis for this courts review.

Further, **In RE EMERALD CITY RECORDS, INC. 9 B.R. 319 (Bk.N.D.Ga. 1981)** pre-dates the legislative changes of July 10, 1984 and the rights conferred to bankruptcy courts to conduct jury trials as indicated in **M^{c}CORMICK** and **ADAMS, BROWN & BATES, LTD.**

It is further noted that **EMERALD CITY** was based upon a formal request to the bankruptcy court for remand which was granted. In the present case, Petitioner did not request remand but rather waived its right and summarily proceeded to state court without first researching the current state

of federal law. Petitioners error at the bankruptcy court is the true reason relief is now sought before this Court.

Petitioners citation of **MID ATLANTIC NATIONAL BANK v. NEW JERSEY DEPT. of ENVIRONMENTAL PROTECTION 474 U.S. 494 (1986)** against seeks to boot strap the states interest in health and safety statutes and ordinances designed to protect the physical health of its citizens from civil wrongdoings. There is a clear distinction between health and safety versus civil claims. Respondent submits that appellants use of **MID ATLANTIC** is misplaced under the present facts and circumstances.

Respondent contends that the citation of **GUTHRIE, ACTION FOR MALICIOUS PROSECUTION BASED ON INVOLUNTARY BANKRUPTCY, INSOLVENCY OR RECEIVERSHIP PROCEEDING, 40 A.L.R. 3d 296 (1971)** is misplaced. First, Petitioner

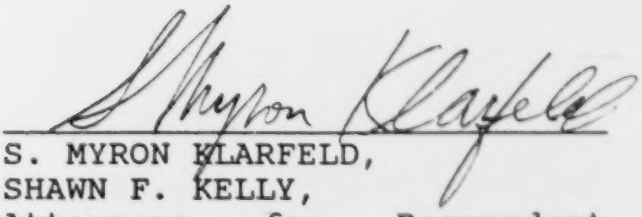
incorrectly cites the volume as being a 1986 edition. Secondly, Petitioner does not consider that the citation is out dated as since the 1971 publishing 11 U.S.C. § 303 was enacted and amended as of July 10, 1984 which grants remedies not otherwise available in 1971 when Mr. Guthrie published his article.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Dated: February 9, 1990

Respectfully submitted,
KLARFELD & CAPPS

By: 

S. MYRON KLARFELD,
SHAWN F. KELLY,
Attorneys for Respondent
TERRY'S TRACTOR, INC.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
)
COUNTY OF SAN DIEGO)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the United States and a resident of the County of San Diego, over the age of eighteen (18) years and not a party to the within action or proceeding; that my business address is 1660 Hotel Circle North, Suite 304, San Diego, California 92108; that on February 13, 1990, I served the within **OPPOSITION TO PETITION FOR WRIT OF CERTIORARI** in said action or proceeding by depositing true copies thereof in a separate envelope for each addressee named hereafter, addressed to each addressee respectively as follows:

Clerk, U.S. Supreme Court 1 First Street, N.E. Washington, D.C. 20543	Original and 39 copies (via Federal Express)
Clerk, California Court of Appeal Fourth Appellate District 750 B Street, Suite 5000 San Diego, CA 92101	3 copies
Clerk of the San Diego Supervisor Court for the Honorable Jeffrey T. Miller 325 South Melrose Drive Vista, CA 92083	3 copies

Gregory W. Pollack, Esq. 3 copies
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San Diego, CA 92101

Dennis J. Wickham, Esq. 3 copies
Gerald L. McMahon, Esq.
Craig E. Courter, Esq.
Seltzer Caplan Wilkins &
McMahon
3003-3043 Fourth Avenue
San Diego, CA 92103

I then sealed the envelopes and placed them for mailing in accord with our business's practice on February 13, 1990.

I am readily familiar with our business's practice for collecting, processing and mailing correspondence and pleadings. Such correspondence and pleadings are deposited on the same day with the U.S. Postal Service in the ordinary course of business.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on February 13, 1990.

Judith A. Atwood
JUDITH A. ATWOOD

Supreme Court, U.S.
FILED
FEB 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

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TERRY'S TRACTOR, INC., a California corporation; GEORGE LARABEE, individually and doing business as L & L CONSTRUCTION AND L & L ELECTRIC; and WALTER L. SCHWAAR, individually and doing business as THE LIGHT GALLERY,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The California state trial court, following a recent Ninth Circuit opinion, held that a claim for damages arising out of an allegedly wrongful filing of an involuntary bankruptcy petition is within the exclusive jurisdiction of the Bankruptcy Court and therefore petitioner's state court action for malicious prosecution and abuse of process was barred. 11 U.S.C. § 303(i) provides remedies, within the bankruptcy setting, which exceed those available in common law for malicious prosecution and abuse of process. The state trial court decision was affirmed on appeal.

Should the U.S. Supreme Court review a California state court decision that the Bankruptcy Court has exclusive jurisdiction for damage claims arising out of the allegedly wrongful institution of an involuntary bankruptcy petition?

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

In *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987), the Ninth Circuit noted that the Bankruptcy Court has exclusive jurisdiction regarding damage claims brought by one maintaining that a bankruptcy petition was wrongfully instituted. For debtors against whom involuntary bankruptcy petitions have been wrongfully commenced, the generous remedies are set forth in 11 U.S.C. § 303(i), and consist of costs, attorneys' fees, compensatory damages, and punitive damages.

There is a clear incompatibility between state court jurisdiction and federal interests in regard to determining the propriety of a bankruptcy petition and potential redress for wrongfully instituted bankruptcy petitions.

Matters arising under bankruptcy law have long been the exclusive province of federal bankruptcy courts. State court jury verdicts would have a chilling effect on one's exercising the federal right to petition for bankruptcy. Moreover, by allowing a separate state cause of action for wrongfully instituting bankruptcy petitions, there would arise differing standards by which to evaluate identical conduct.

In this case, the petitioner, GENE R. SMITH CORPORATION (hereinafter "Petitioner"), was subject to an involuntary Petition for Bankruptcy brought by respondent TERRY'S TRACTOR, INC., and joined by respondent WALTER L. SCHWAAR, individually and dba THE LIGHT GALLERY (hereinafter "Respondents"), which was dismissed without prejudice. Petitioner, with apparent full knowledge of the generous remedies set forth in 11 U.S.C. § 303(i), chose to ignore that section and proceed with a malicious prosecution and abuse of process lawsuit in state court.[1]

The availability of 11 U.S.C. § 303(i), which sets forth remedies greater than those available in state court, coupled with the clear incompatibility between state court

---

[1] One can only speculate why Petitioner did not want the bankruptcy judge who dismissed the Petition, the individual in the best position to evaluate the bad faith or lack thereof on the part of Respondents, to rule upon the propriety of the Petition.

jurisdiction and federal interests in regard to determining the propriety of bankruptcy petitions and potential redress for wrongfully instituted bankruptcy petitions, compels this Court to deny the Petition.

REASONS FOR DENYING THE WRIT

None of the reasons proffered by Petitioner are persuasive upon even the most cursory examination.

A. The Argument That the *Gonzales* Case Is Inapplicable.

In *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987), the Ninth Circuit held that since federal courts have exclusive jurisdiction over bankruptcy matters, Congress and the federal courts, not state courts, determine what incentives and penalties are appropriate for bankruptcy violations. In *Gonzales, supra*, Jerome and Barbara Parks sued Richard and Juliana Gonzales (and their attorney, Michael Dodge) for abuse of process arising out of the Gonzales' filing of a Chapter 11 bankruptcy petition, a filing which was apparently done in an effort to avoid the Parks' efforts to foreclose upon a deed of trust held on real property owned by the Gonzales. The District Court granted defendant Gonzales' motion for summary judgment, after which the matter was appealed to the Ninth Circuit.

Without dissent, the Ninth Circuit affirmed the District Court's granting of defendant Gonzales' motion for summary judgment on the ground that state tort law

cannot afford a cause of action for the filing of a frivolous bankruptcy claim, and noted that state courts have no jurisdiction to adjudicate a claim that a bankruptcy filing was frivolous:

> *Implicit in the Parkses' appeal is the notion that state courts have subject matter jurisdiction to hear a claim that the filing of a bankruptcy petition constitutes an abuse of process. We disagree with that assumption.* Filings of bankruptcy petitions are a matter of exclusive federal jurisdiction. State courts are not authorized to determine whether a person's claim for relief under a federal law, in a federal court, and within that court's exclusive jurisdiction, is an appropriate one. Such an exercise of authority would be inconsistent with and subvert the exclusive jurisdiction of the federal courts by allowing state courts to create their own standards as to when persons may properly seek relief in cases Congress has specifically precluded those courts from adjudicating. Cf. *Siravo v. Siravo*, 424 A.2d 1047, 1049-50 (R.I. 1981) (because the bankruptcy courts have exclusive jurisdiction over bankruptcy, a bankruptcy court's determination that a section of the Bankruptcy Act is unconstitutional may not be challenged in a state court). The ability collaterally to attack bankruptcy petitions in the state courts would also threaten the uniformity of federal bankruptcy law, a uniformity required by the Constitution. U.S. Const. art. I, § 8, cl. 4.
>
> That Congress' grant to the federal courts of exclusive jurisdiction over bankruptcy petitions precludes collateral attacks on such petitions in state courts is supported by the fact that remedies have been made available in the federal courts to creditors who believe that a filing is frivolous. Debtors filing bankruptcy petitions are subject to a requirement of good faith, *In re Thirtieth Place, Inc.*, 30 B.R. 503, 505 (Bankr.App.

> 9th Cir. 1983), and violations of that requirement can result in the imposition of sanctions. *In re 2218 Bluebird Ltd. Partnership*, 41 B.R. 540, 542-43 (Bankr. S.D. Calif. 1984); see *In re Villareal*, 46 B.R. 284 (Bankr. C.D. Calif. 1984) (sanctions awarded because debtor's filing was "an abuse of the bankruptcy process"); Bankr. R.9011. Cf. 11 U.S.C.A. § 303(i)(2) (Supp. 1987) (*authorizing the imposition of sanctions on petitions for involuntary bankruptcy petitions filed in bad faith). Congress' authorization of certain sanctions for the filing of frivolous bankruptcy petitions should be read as an implicit rejection of other penalties, including the kind of substantial damage awards that might be available in state court tort suits.* Even the mere possibility of being sued in tort in state court could in some instances deter persons from exercising their rights in bankruptcy. In any event, it is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the bankruptcy process and when those incentives or penalties shall be utilized. [Emphasis added.]

Id. at 1035-1036.

Petitioner argues that since the underlying bankruptcy matter has concluded, it is not barred from pursuing a state court action for abuse of process and malicious prosecution. Petitioner suggests under *Gonzales v. Parks, supra,* that such an action would be barred *only* during the pendency of the bankruptcy action. There is no authority for this position. *Gonzales, supra,* is contrary authority for this position. A reading of that case reveals that it does *not* hold that the lack of subject matter jurisdiction and federal preemption can only be raised during the pendency of the bankruptcy matter.

In *Gonzales, supra,* the trial judge had granted defendant's motion for summary judgment based upon his belief that the state court action was void at its inception as violative of the automatic stay provision of the Bankruptcy Act. Thus, the *trial court* did in some fashion believe that the pendency of the bankruptcy action precluded the state court action. *The Ninth Circuit, however, affirmed the court's decision on other grounds.* ("We affirm the bankruptcy court's decision on other related grounds." *Gonzales, supra,* at p. 1035.) The Ninth Circuit expressly noted that it was *not* basing its decision upon the pendency of the bankruptcy action as it was not clear that the automatic stay provision of 11 U.S.C. § 362(a) was applicable, inasmuch as Section 362(a) provides an automatic stay to prior debts and obligations, and the alleged abuse of process (the filing of the bankruptcy action, itself) was not a prior debt or obligation, but rather occurred at the moment of filing by virtue of the filing. *Ibid.*

The Ninth Circuit opinion goes on to state that federal courts have exclusive jurisdiction over claims regarding the alleged wrongfulness of a bankruptcy petition. Nowhere is there mention of this "pendency requirement" which petitioner wishes the court to read into that decision.

In unambiguous language, the *Gonzales* court states:

> For the same reasons that we conclude *infra* that state courts have no jurisdiction to adjudicate any claim that a bankruptcy filing was frivolous, state tort law cannot afford a cause of action for the filing of a frivolous claim.

830 F.2d at 1035.

The court further stated:

> Implicit in the Parkses' appeal is the notion that state courts have subject matter jurisdiction to hear a claim that the filing of a bankruptcy petition constitutes an abuse of process. We disagree with that assumption.

830 F.2d at 1035.

When one examines one of the main rationales behind the federal preemption position, it is clear that tacking on a "pendency requirement" does not subserve the rationale. In *Gonzales, supra,* the court noted:

> Even the mere possibility of being sued in tort in state court could in some instances deter persons from exercising their rights in bankruptcy.

830 F.2d at 1036.

If one could wait until the bankruptcy action is completed, and then sue for malicious prosecution or abuse of process, clearly such could "deter persons from exercising their rights in bankruptcy," a very reason behind not allowing state court remedies in cases of this nature.

B. The Argument That There Is No Legislative History Which Indicates the Bankruptcy Court Has Exclusive Jurisdiction Over Claims for Wrongfully Instituted Bankruptcy Petitions.

Petitioner argues that there is no discernible intent from the legislative history that there be exclusive jurisdiction regarding improperly instituted bankruptcy petitions and, accordingly, there must be concurrent jurisdiction.

The presumption of concurrent jurisdiction need not be rebutted by a legislative history, alone. The presumption of concurrent jurisdiction can be rebutted by "a clear incompatibility between state-court jurisdiction and federal interests." *Gulf Offshore Company v. Mobil Oil Corporation*, 453 U.S. 473, 478 (1981) ("Congress, however, may define jurisdiction to the federal courts either explicitly or implicitly. Thus, the presumption of concurrent jurisdiction can be rebutted by an explicit statutory directive, by unmistakable implication from legislative history, *or by a clear incompatibility between state-court jurisdiction and federal interests.*" [Emphasis added.])

Allowing state court jurisdiction over claims for wrongfully instituted bankruptcy petitions would clearly represent an incompatibility between state court jurisdiction and federal interests:

1. If an individual against whom a petition for bankruptcy was improperly brought could thereafter avail himself of a state court lawsuit, such would create a chilling effect upon the exercise of a very important federal right, i.e., the right to petition for involuntary bankruptcy. Individuals might be deterred from exercising their federal bankruptcy rights because of a fear that such an exercise might result in being sued in state court.

2. If state courts were permitted to entertain claims of malicious prosecution in cases of wrongfully instituted bankruptcy petitions, there would arise a body of state law in each state regarding the propriety of filing bankruptcy petitions which may differ from state to state as well as from federal law. California, for example, could come up with a more liberal body of law as to what

constitutes malicious prosecution in filing a petition for involuntary bankruptcy than that developed in Georgia or other states. The federal standard of "bad faith" set forth in 11 U.S.C. § 303(i)(2) might differ from the states' standards of malice. Different standards evaluating identical conduct would hamper the uniform law to be applied in bankruptcy proceedings. By leaving jurisdiction exclusively with the federal courts, with 11 U.S.C. § 303(i)(2) as the sole remedial measure, however, uniform standards would develop which would govern all citizens of the United States in regard to the exercise of the federal right to petition for involuntary bankruptcy.

3. The remedies set forth in 11 U.S.C. § 303(i) consist of costs, attorneys' fees, compensatory damages, and punitive damages, remedies which are equal to, or in the case of attorneys' fees greater than, those available for a state cause of action for malicious prosecution in California. In California, the attorneys' fees incurred in the prosecution of a malicious prosecution action are not recoverable. California Code of Civil Procedure 1021. Thus, any element of damage theoretically recoverable in state law is subsumed by the available remedy in federal law. By enacting such a broad remedial measure as 11 U.S.C. § 303(i), a measure which provides remedies in excess of those available for common law claims for malicious prosecution, Congress was not merely intending to supplement state remedies, but rather intended to subsume and preempt them.

4. Under 11 U.S.C. § 303(i), the bankruptcy judge who had ruled on the propriety of the involuntary bankruptcy petition is the same judge who determines what

award of damages, if any, is given as a result of a wrongfully filed petition for involuntary bankruptcy. This is an excellent arrangement, inasmuch as that particular judge is in a better position to evaluate the existence, or lack thereof, of good faith in the filing of the bankruptcy petition than a jury in a state court looking at the matter years later. In California, absent certain exceptions not applicable in this scenario, a judge may not be called as a witness to testify in a subsequent proceeding about a matter over which he had previously presided. California Evidence Code section 703.5. Thus, in a malicious prosecution lawsuit brought in state court, the individual in the best position to evaluate the propriety of the bankruptcy petition, i.e., the bankruptcy judge who dismissed the improperly filed petition, is precluded from testifying.

5. Another advantage of the federal remedy over a potential state court remedy would be the fact that redress, if any, could be accomplished within a very short period of time. The bankruptcy judge could take evidence and rule on the propriety of the filing shortly after dismissal of the involuntary bankruptcy petition whereas if the matter were to proceed by way of a complaint in state court, the case could languish for several years before trial.

6. Absent a successful defense of collateral estoppel, a debtor could *unsuccessfully* move for sanctions pursuant to 11 U.S.C. § 303(i) for a claimed malicious filing, only to turn around and *successfully* sue for malicious prosecution in state court, thereby resulting in an award inconsistent with a prior bankruptcy determination. Of course,

the reverse could also take place, with the debtor receiving a finding of a bad faith filing on the part of a creditor in a bankruptcy proceeding, and then attempt to sue for malicious prosecution in state court, only to lose the state court action. In either event, there would be inconsistent results in different forums based upon the same set of operative facts.

Petitioner cites *Kensington Development Corp. v. Israel*, 142 Wis.2d 894, 419 N.W.2d 241 (1988), as the only case to consider *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987), claiming that in *Kensington, supra*, the Wisconsin Supreme Court held that state tort claims could be asserted once the bankruptcy court dismisses the bankruptcy action case. Petitioner is incorrect in stating that the *Kensington, supra*, case is the only case to consider *Gonzales, supra*, and has further mischaracterized the holding in *Kensington, supra*. *Kensington, supra*, did not involve allegations of a wrongfully filed bankruptcy petition. Rather, in *Kensington, supra*, an unsecured creditors' committee and its attorney filed an allegedly sham and frivolous lis pendens in connection with an adversary complaint in a Chapter 11 bankruptcy. The adversary complaint was dismissed for lack of jurisdiction, and the dismissal order included a provision which ordered the defendants to withdraw the lis pendens notice. Plaintiffs alleged the lis pendens clouded title to their property for over four months and interfered with sales of the property. The Wisconsin Supreme Court held that plaintiff could file a state court action arising out of the filing of a sham or frivolous lis pendens. ("State courts regularly determine issues involving alleged false, sham or frivolous instruments, the subject matter of [Wisconsin's slander of title

section]." 419 N.W.2d at 243.) Significantly, in *Kensington, supra*, the filing of the bankruptcy petition, an act authorized by federal law, was *not* an issue. Rather, the issue was whether the filing of a lis pendens, an act authorized by state law, was actionable in state court.

Another Wisconsin case, not cited by Petitioner, noted with approval the holding in *Gonzales v. Parks, supra*. In *Gonzales v. AM Community Credit Union*, 150 Wis.2d 773 (1989), the Wisconsin appellate court held that a discharge in bankruptcy acts as an injunction against actions to collect on a debt, but does not bar state causes of action to vindicate collection abuses nor reserve exclusive protection of those acts to the federal court. In so holding, the court distinguished its facts from *Gonzales v. Parks, supra*, which involved the wrongful initiation of a bankruptcy petition, the remedies for which, according to this Wisconsin appellate court, lie exclusively in federal court. The Wisconsin court noted that filing a lawsuit as a result of a claimed wrongful bankruptcy petition is an act which essentially arises under title 11 and, accordingly, such action must be brought in district court, which has original and exclusive jurisdiction of all cases under title 11 pursuant to 28 U.S.C. § 1334(a) ("Except as provided in subsection (b) of this section, the district court shall have original and exclusive jurisdiction of all cases under title 11."):

> Therefore, this case is very different from *Gonzales v. Parks*, 830 F.2d 1033 (9th Cir. 1987) on which AMC relies. *Parks* is a case 'under' title 11. In that case, the court stated that 'it is for Congress and the federal courts, not the state courts, to decide what incentives and penalties are appropriate for use in connection with the

> bankruptcy process and when those incentives or penalties shall be utilized.' *Id.* at 1036. This statement must be read in its context: a discussion of whether a state court may hear a claim that the filing of bankruptcy petition constitutes abuse of process. *Id.* at 1035.
>
> The *Parks* court noted that bankruptcy filings are a matter of exclusive federal jurisdiction. *Id.* Filings are claims for relief under federal law and they constitute cases under title 11, over which the federal courts have exclusive jurisdiction. *Id.* at 1035 & n. 6. A grant of exclusive jurisdiction includes the implied power to protect that grant. *Id.* at 1036.
>
> While the underlying federal question in *Parks* was the validity of the bankruptcy filing, the underlying question in this case is the validity of the wage deduction. Since filings are exclusively within the province of the federal courts, attacks on filings must be mounted in the federal courts.

150 Wis.2d at 781.

C. The Argument That Exclusive Jurisdiction Within the Federal Bankruptcy Court for Claims of Wrongfully Instituted Bankruptcy Petitions Would Be Unconstitutional.

Petitioner maintains that to interpret 11 U.S.C. § 303(i) as preemptive of state malicious prosecution and abuse of process actions would render that section unconstitutional, inasmuch as an aggrieved party would be deprived of a right to a jury trial regarding the propriety of the bankruptcy petition.

Petitioner did not raise this issue at the trial level. At the state appellate level, Petitioner devoted a mere three

sentences to this argument in his opening brief, and ignored it in his reply brief. In its petition to the Supreme Court of the State of California, Petitioner ignored this argument, devoting not a single sentence to it.

The reason for Petitioner's neglect of this argument is obvious and merits little or no response. There is no constitutional right to a jury trial in matters that arise out of the bankruptcy process even if a jury would be available had the claim been made outside of the bankruptcy setting. *Katchen v. Landy*, 382 U.S. 323, 336-337 (1965); *Barton v. Barbour*, 104 U.S. 126, 133-134 (1881).

CONCLUSION

An aggrieved debtor against whom an involuntary bankruptcy petition has been instituted in bad faith has available to him broad, generous remedies pursuant to 11 U.S.C. § 303(i). Whether a bankruptcy petition has been commenced in bad faith and what remedies, if any, are available to the individual against whom the bankruptcy petition has been wrongfully filed are issues that arise under bankruptcy law and are matters for which there is exclusive jurisdiction in the federal bankruptcy court. Accordingly, Petitioner's state court claims for malicious prosecution and abuse of process were properly dismissed by the state trial court, a dismissal which was affirmed through the California state appellate system. There is a clear incompatibility between state court jurisdiction and federal interests in this area.

The petition should be denied.

Respectfully submitted,

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